

Mid-Atlantic, Inc., d/b/a Conner's Super Store and Retail Store Employees Union, Local 876, United Food and Commercial Workers International Union, AFL-CIO and Geraldine Thomas and Irean Neal. Cases 7-CA-19478, 7-CA-19615, and 7-CA-19629

March 4, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
JENKINS AND HUNTER

On October 27, 1982, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mid-Atlantic, Inc., d/b/a Conner's Super Store, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's finding that evidence introduced at the hearing indicated that Respondent was aware of the union activities of the discharged employees. Accordingly, we find it unnecessary to pass on his finding that the small plant doctrine also appears to be applicable.

Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). That decision concerns identifying the cause of a discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. To attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The original charge in Case 7-CA-19478 was filed by Retail Store Employees Union, Local 876, United Food and Commercial Workers International Union, AFL-CIO, herein referred to as the Union, on June 24, 1981, and served by certified mail on Mid-Atlantic, Inc., d/b/a Conner's Super Store, herein referred to as the Respondent, on June 25, 1981. An amended charge in Case 7-CA-19478 was filed by the Union on July 8, 1981, and served by certified mail on the Respondent on or about July 9, 1981. The charge in Case 7-CA-19615 was filed by Geraldine Thomas, an individual, on July 29, 1981, and served by certified mail on the Respondent on or about August 5, 1981. The charge in Case 7-CA-19629 was filed by Irean Neal, an individual, on July 31, 1981, and served by certified mail on the Respondent on or about August 4, 1981. An order consolidating cases and amended complaint and notice of hearing was issued on September 8, 1981, alleging, among other things, that the Respondent had engaged in certain unlawful conduct in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, herein referred to as the Act, and had unlawfully discharged Mildren Cunningham and Carol Thomas and suspended Geraldine Thomas in violation of Section 8(a)(3) of the Act. The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The matter came on for hearing on July 22 and 23, 1982, in Detroit, Michigan. Each party was afforded full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

Upon the entire record¹ in this case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material herein, the Respondent has maintained its principal office and place of business at 4705 Conner in the city of Detroit and State of Michigan, sometimes referred to herein as the Conner store. The Respondent is, and has been at all times material herein, engaged in the retail sale of meat, groceries, paper items, and related products. The Respondent's Conner store is the only facility involved in this proceeding.

During the year ending December 31, 1980, which period is representative of its operations during all times

¹ In accordance with the agreement of the parties, certain exhibits were submitted after the close of the hearing. These have been marked as Resp. Exhs. 9 through 18 and are hereby received in evidence, made a part of the record, and incorporated in the exhibit file.

material herein, the Respondent, in the course and conduct and its business operations, derived gross revenues in excess of \$500,000 and purchased and caused to be transported and delivered to its Conner store paper products, groceries, and other goods and materials valued in excess of \$5,000, of which goods and materials valued in excess of \$2,000 were transported and delivered to its Conner store directly from points located outside the State of Michigan.

The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

First: The General Counsel claims that Otis Sims is a supervisor within the meaning of the Act.

Samir A. Danou is the owner and operator of the Respondent. He described his duties as follows: "I hired; mostly I get involved with hiring people, assign the people to what they should do. I get involved with advertising, ordering mass merchandise for the stores, mainly overseeing the whole operation."² Danou described the organization of the Conner store as follows: "We have a manager, co-manager and like the head of departments and then the general workers." The departments are grocery, produce, dairy, and meat. Around 30 employees work in the Conner store.

At times material herein, Kenny Korryla was the manager and Martin Tonka was the co-manager. Otis Sims was the head of the meat department, which employed "general workers" Mildren³ Cunningham, Carol Thomas, Sharon Kinard, and Clint Sims. Cunningham and Carol Thomas were meat clerks who wrapped meat and "set up the meat counter daily." Carol Thomas explained, "In the morning—meat has expiration dates so you would pull it, rotate it, clean it off, straighten it out and put fresh meat in it." Kinard worked in the deli. Clint Sims cut and prepared meat for sale. The employees referred to Otis Sims as the "meat manager."

Carol Thomas described Otis Sims' job as follows: "He would tell us certain things that we had to do each day, setting up the meat counter. We checked the lunch meat, straightened up the counter, check the freezer department, certain prices and days that we had to wash the meat counter." When Carol Thomas asked Sims for time off on Saturdays in the latter part of April 1981 so that she could attend Marygrove school, Sims granted the time off stating that "Sharon Kinard could work in [her] spot because she needed the hours." Cunningham testi-

fied that Sims also had granted her time off to go to the doctor and to "see about [her] gas bill."⁴

Cunningham further testified that she was hired by Otis Sims. According to Cunningham, she approached a woman (whom she later learned was Mrs. Danou) at the Conner store during its grand opening, and asked her whether "they [the Respondent] were hiring in the meat department." Cunningham was directed to Sims. She "talked with Otis Sims and he hired [her] to start work that very next day." Sims asked her "about [her] experience and operating the wrapping machine and the part of weighing meat, traying meat and [did she] know [her] cuts" before he hired her.⁵

Carol Thomas testified that she was hired by Korryla over Sims' objections: "Otis did not want to hire [her] Otis' reason was because *he had hired* someone else that particular day." (Emphasis supplied.) According to Thomas, Korryla sent her to Sims to see if he needed help. Sims said he had already hired a girl. On her way out she was approached by Korryla, who asked her whether Sims had given her a part-time job. She answered in the negative, whereupon Korryla "went back and took [Thomas] back to the meat department and told Otis that he wanted him to give [her] a part time job."

During her tenure, Cunningham approached Sims for a raise. He answered that he would talk to Danou.

Otis Sims spent the majority of his time cutting meat and grinding hamburger. He also "wrote the order slip to order the meat." Sometimes Sims wrapped meat and put it on display. Carol Thomas testified, "He would be half the day on the phone setting up the orders, what is to come in, and half the time cutting and telling us what to do." Sims directed the employees "to wrap up meat and put it on the shelves . . . [and] to keep [the] work area clean." Sims also talked to the packing houses⁶ which would "bring in the meat and chicken parts." Manager Korryla's weekly salary was \$400, co-manager Tonka's was \$350, and "meat manager" Sims was \$350.

Carol Thomas and Cunningham referred to Otis Sims as the "meat manager" and their supervisor, Sims referred to himself as a "meat cutter," and Danou referred to Sims as the "head butcher." Sims testified that he di-

⁴ Sims admitted that Carol Thomas had asked him for time off. His version was that he told her he would have to "check with Kenny. . . . Kenny wanted to know if I could get along without her. I said I could" Sims testified that he then "told her she could have the time off." Thus, it is clear that the final decision whether Thomas was needed on Saturdays was left to Sims.

⁵ Sims denied that he had hired Cunningham. Sims testified that at the time there was a sign in the front of the store which read "meat wrapper wanted." When Cunningham approached him, he asked her, as testified by Cunningham, about her experience and where she had worked. Sims then sent her to Korryla, the manager, who returned with her and asked Sims whether he needed help. Sims answered in the affirmative. Korryla "turned around and walked off and Mildred [sic] came and said she got the job and she came to work the next morning at 9:00 o'clock." I credit Cunningham's version. In this regard it is significant that the Respondent did not call Korryla, its manager, to corroborate Sims' testimony.

⁶ In his testimony Sims referred to a person as "Al," whom Danou described as being "in charge of the meat departments" in Danou's various stores. Sims testified that "Al" would call every day and that he also called "Al." Sims further stated, "I would tell him what we got and we are running low, and he would say order it." Sims would then order the meat.

² Conner's Super Store is not the only store operated by Danou. The Respondent opened its Conner store in the fall of 1980. The central office is located at one of Danou's other stores on Michigan Avenue about "ten minutes" driving time from the Conner store.

³ While the transcript reports Cunningham's name as "Mildred," her signature on her union authorization card shows "Mildren."

rected no one because "[e]verybody knows the job. I really didn't have to tell anybody to do anything."

Otis Sims denied that he exercised any supervisory authority, and Danou denied that Sims had been given any supervisory authority. These denials, of course, must be weighed against any credible evidence in the record to the contrary.

A review of the credible evidence reveals that Otis Sims was referred to as the manager of the meat department, that he directed the employees in the performance of their daily tasks in that department, that he granted time off to meat department employees, that he was contacted with respect to wage raises by employees in the meat department, that he hired at least one employee who worked in the meat department, and that he conferred with "Al" concerning the need for butcher products for sale and thereafter ordered such products. Moreover, Sims was a salaried employee whose wage scale was in the range of those of the manager and the co-manager. These are all indicia of supervisory status. I find that Otis Sims is, and was at all times material herein, a supervisor within the meaning of the Act. See *Luke's Supermarket, Inc.*, 228 NLRB 763 (1977). As was true in *Luke's Supermarket, Inc.*, if Sims were found not to be a supervisor, the meat department employees would, in effect, be without close daily supervision. There was no showing that the manager or the co-manager spent time in the daily supervision of the meat department employees. Indeed, with respect to "Al," who supervised the various meat departments in Danou's stores, Danou testified, "He [Al] answers to me and he is in charge of the meat departments." Thus, without Sims' presence in the meat department that department would have lacked any direct supervision.

Second: The General Counsel contends that Otis Sims committed certain violations of Section 8(a)(1) of the Act. On May 8, 1981, a union organizing meeting occurred at the home of Christine Butler, an ex-employee of the Respondent. Employees who attended the meeting were Carol Thomas, Mildren Cunningham, and Irean Neal. Willie Jackson, a union representative, was present. Supervisor Otis Sims, who had been invited to the meeting by Butler, arrived near the end of the meeting. All of the employees present, as well as Sims, signed union authorization cards.⁷ Geraldine Thomas explained that the "purpose of the meeting was to get everyone together to see what they could do about getting us together to form a union."

According to Carol Thomas, a few days after the union meeting, Otis Sims approached her and told her "to leave the union alone," and further told her that "he [had] talked to the cashiers⁸ up front and that they had agreed to let the union alone because if they didn't, that Sam [Danou], before he would see a union in his store, he would close it down." About a week later in the presence of Cunningham, Kinard, and herself, further according to Thomas, "Otis told all three . . . that Sam had seen [their] names on cards and that [they] would

get fired if [they] continued to have dealings with the Union and for [them] to let it go and leave it alone."

Cunningham testified that when she and Carol Thomas were together about a week after the union meeting Otis Sims said "that he knew that if we kept on with that union Sam would close the store down before he would let the union come in there."⁹

Otis Sims' remarks to the effect that the Respondent would close the store if the Union came in were in violation of Section 8(a)(1) of the Act. See *Model A and Model T Motor Car Reproduction Corporation*, 259 NLRB 555 (1981). His statements that employees should leave the Union alone and that they would get fired if they continued to deal with it were also in violation of Section 8(a)(1) of the Act.

Third: The General Counsel further contends that Samir "Sam" Danou committed certain violations of Section 8(a)(1) of the Act. Irean Neal, who had attended the union meeting, testified credibly that about 3 or 4 weeks before the union meeting she conversed with Danou. Among other things, Danou asked Neal if she would watch other cashiers. As testified by Neal, "It went on from word to word about me watching cashiers and watching and seeing what other cashiers were doing. I'm not for sure how it was that he noticed the union man¹⁰ had been in the store; did I get a card and had I signed one. I said no. He asked me for my number." (Neal testified that she was not sure whether Danou asked her if she had signed a card¹¹ or asked her if she had been given a card.) About 3 weeks after the union meeting, Neal conversed again with Danou. During the conversation, Danou said that "a little bird had flew and told him [Neal] signed a union card." Neal asked him "did the little bird bring the card that [she] signed."

According to Geraldine Thomas, on Sunday, May 10, 1981, it was brought to her attention by Manager Korryla (the Respondent claims the date was May 3, 1981) that she had a shortage in her "till" and that she would have to see Danou. Although she had only worked until 12 p.m., she was "told to go home and come back the next day"; and was further told that "they [the Respondent] would have to investigate it before they could let [her] continue to run a register." This was the first she had known of the shortage.

On Monday morning (the next day) Geraldine Thomas and her husband met with Danou in his office. Danou asked Thomas about the shortage and if she knew "what happened that day." She responded that she did not know there was a shortage.

The next day (Tuesday, May 12, 1981) Danou called Geraldine Thomas and asked her "to come in alone, not with [her] husband." Thomas went to the store and met with Danou. He asked her if she wanted "to make some extra money . . . by being his extra eyes . . . by watching the other cashiers and seeing what they are doing."

⁹ In Cunningham's affidavit given to a Board agent appears: "Sims stated that Sam would close the store down before he would have a union in there."

¹⁰ Sims testified that he had seen the union man in the Conner store once.

¹¹ Neal's affidavit given to a Board agent indicates that she was not asked whether she had signed a union card.

⁷ Geraldine Thomas had also signed a card on April 23, 1981.

⁸ Geraldine Thomas and Neal were cashiers.

Thomas declined, observing that she was hired as a cashier. According to Thomas, "He [Danou] got upset when [she] . . . didn't want to do that. After that he told [her] that he knew there was a union meeting, that [they] had a union meeting." Thomas replied that she did not know anything about a union meeting. Among other things, Thomas testified that Danou said "before he would have a union in the store he would close the damn place down." Thomas asked Danou when she was supposed to return to work. He replied the next day, on which date Thomas returned to work. The alleged shortage was \$721.30.

Danou asserted that the shortage occurred on Friday, May 1, 1981, and that Geraldine Thomas was informed of the shortage on Sunday, May 3, 1981, all of which occurred prior to the union meeting on May 8, 1981. The Respondent offered credible store records which established that the shortage incident occurred on May 1, 1981.

In light of the Respondent's record offered in evidence and of the testimony of Geraldine Thomas, I have concluded that the General Counsel has not proved by a preponderance of the evidence his allegations concerning Danou's alleged violations of Section 8(a)(1) contained in the amended complaint in regard to statements made to Thomas by Danou, and I shall dismiss such allegations. As to Danou's remarks to Irean Neal, I find by a preponderance of the evidence that they were made as recited in Neal's testimony. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by Danou's misconduct as follows: Danou's interrogation of Neal as to whether she obtained a union card and Danou's creation of the impression of surveillance in stating to Neal that a little bird had told him that she had signed a union card. I discredit Danou's testimony that he had no knowledge of the Union's organizational efforts, and find that he knew of the Union's interest in organizing his store prior to the union meeting on May 8, 1982.

Fourth: The General Counsel further contends that the 1-1/2 days Geraldine Thomas missed from work as above detailed constituted a discriminatory suspension in violation of Section 8(a)(3) of the Act. While there may be a suspicion that Thomas was discriminated against, in view of the above findings I conclude that the General Counsel has not sustained his burden in this respect, and I shall dismiss the allegations in the amended complaint relating to Thomas' alleged unlawful suspension.

Fifth: The General Counsel further contends that Mildren Cunningham and Carol Thomas were discharged on June 20, 1981, in violation of Section 8(a)(3) of the Act.

Cunningham was one of the employees who had attended the union meeting of May 8, 1981. According to Cunningham's testimony, she was sick on June 20, 1981. In the morning around 7 a.m., she phoned the store to report that she was sick, but received no answer, whereupon she "took [her] medicine" and "[laid] back down and went to sleep." When she awoke it was after 12 o'clock. She phoned the store. Danou answered and discharged her. He said that she "had left the store in a bad

way because [she] wasn't there."¹² Cunningham immediately donned her clothes and went to the store where she talked to Danou. Danou repeated that she "left the store in a bad way because [she] wasn't there to do [her] job." However, he did tell her that she should get in touch with him in 2 weeks and that he could tell her what she should do. After 2 weeks Cunningham called Danou, who, among other things, said that he had received papers with her name on them, and that if she got "that straightened out that he would see what he could do about having [her] come back to work."

Cunningham testified that she had been absent five times, for which she was not disciplined or reprimanded. During her tenure of employment, Cunningham had received a 50-cent-an-hour raise. Neither Danou nor any other supervisor had complained to her about her work.

With respect to the discharge of Cunningham, Danou testified:

It was June 19, I believe.

* * * * *

He [Al] stopped there after they opened up the store—well, they start early. They open up the store around 7:00 o'clock. Shortly after, Mildred [sic] Cunningham came in, and what they told me when she came in she didn't look normal. Kenny [Korryla] said something to her and so did Al. She started to go to the back to her department and I believe Al and Kenny talked, then Al told her to go see Kenny. When she did they advised her to go home because there was no way that she could work.

* * * * *

Saturday I had a call from Kenny that Carol wasn't there and Mrs. Cunningham didn't show up for work. We talked about the situation, and Kenny is like me, he is very nice and he feels sorry for everybody. I said, "Kenny, this is really not a situation for a store. Let's do something about it. I will bring you a worker." We had to bring that day a worker from another store because they had nobody. Cunningham did not come to work. I said, "How long are we going to go along with something like this?" I said, "Do me a favor. This is her last day," and that is where it stood.

According to Danou, he told Korryla to fire Cunningham. In response to the question, "Did you make any investigation to ascertain why she was absent," Danou replied:

Nobody knew why she was absent including myself because she did not call. She was sent home on Friday, the day before, for being drunk, from what they told me. The next day I would imagine she

¹² Cunningham testified, "He [Danou] said I was discharged for leaving the store in such bad shape without being there to do my job."

knew that we fired Carol. She did not call or come or send a message or anything.

Danou further testified that Cunningham came in around 4 p.m. and collected her pay, at which time, according to Danou, Cunningham was fired. Danou related his conversation with Cunningham:

She told me her reasoning for not coming to the store. Just like anybody else telling you, she told me she was sick and she couldn't make it to work. I said, "Please, you were sent home yesterday and the first thing you should have done was get better to come to work the following day, and here it is you don't even show, you don't call, you don't do anything. We are a supermarket. We are a big store. We have to have people to do the work. If somebody doesn't show it creates all kinds of problems. We are a small operation. If I was a big operation where I had people it wouldn't matter to me. We could just get somebody from here and put them there, but we don't have that so called luxury. We cannot afford it. We depend on our workers a hundred percent, and when they don't show, sometimes I call my wife to come to work or myself. This is the only way. This is the problem we have." I explained this to her; I said, "Let it go for now and call me back in two weeks. Let me see what Kenny's attitude will be and I will make another determination for you." Sometimes if we make a determination I don't want to go against the manager's word and bring somebody back against his will. He is not going to say anything but that is not right. We had already decided we were going to fire her and we left it at that.

Danou explained his policy on absenteeism as follows:

Normally, I would go and talk to my workers, which I can tell you I have talked to every one of them and several occasions in the area they are really lacking, they are not performing. I always work with them and give them more than two or three chances. This is my way of treating my workers. If they would repeat the same kind of problem I feel that they don't care, then I would take a different action.

Cunningham denied that she had a drinking problem and denied that she was drunk on the day in question.

Carol Thomas was also discharged on June 20, 1981. She was also a meatwrapper in the meat department and had attended the union meeting. She had begun her employment with the Respondent in the early part of November 1980. On June 20, 1981, Thomas went to the store to pick up her check. As related by Thomas, "Marty" (Martin Tonka), the co-manager, asked her to come into "one of the smaller offices He [Tonka] told me that he didn't know what the hell was going on, that he didn't understand why they were getting rid of me." Thomas further testified:

Marty told me that he was given orders from the manager of the store, which is Al¹³—I do not know his last name—he said, Al was supposed to tell you this and now he left me holding the bag." He continued to say, "I was told, Carol, to tell you that things are slow and we do not no longer need you." So I asked him, "Well, they're going to keep Mildred [sic] Cunningham," and he told me no. I said, "Well, who will be working in our spot?" He said, "I do not know. I don't know what is going on." He said, "I'm just supposed to give you your two checks and to tell you you are not needed any more."

Carol Thomas asked Tonka if she could get some unemployment compensation papers. He told her to see Danou the following Sunday. On Sunday Thomas returned to the store in the company of her friend, James Fuller. She asked Danou whether her friend could sit in on their conversation. First Danou agreed, but then demanded Fuller's full name. Fuller refused to give Danou his surname. An argument ensued which resulted in a call to the police to have Fuller "thrown out." The police arrived and Thomas and Fuller left the store. Thomas was never told by Danou why she was fired although she asked the question of Danou when the police were present.

Danou's version of Carol Thomas' discharge was substantially different. According to Danou, on June 19, 1981, "Johnny," the butcher, phoned Danou and complained that he had "a lot of work to do" and needed help. Apparently, only Thomas and the butcher were working in the meat department at the time, and Thomas had refused to help the butcher with his work. Danou went to the store and told Thomas, "Carol, please, how come you have this kind of attitude? It's not something you can't do. The man is asking you to scrape meat. You have done this a million times." Danou further testified, "I told her [Thomas] in my own way. I have always been kind to my workers all the time, and she refused to do it." Thomas responded, "This is not my job. I don't get butcher's wages. I will not do it." Continuing, Danou testified, "I was mad myself. . . . I . . . told Kenny. . . . I said, 'Kenny, at the end of the day do me a favor, fire the girl.' However, according to Danou, he allowed Thomas to remain until the end of the day since he had "nobody with experience of wrapping meat." Thomas testified that she "refused to go back and cut on saw," but that "it was weeks before she was fired."

The General Counsel must meet the burden of proof set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). To meet this burden, the General Counsel has offered evidence that (1) the Respondent knew that Carol Thomas and Cunningham had signed union cards and had attended a union meeting 6 weeks prior to their discharges;¹⁴ (2) of the four employees,

¹³ Thomas in her later testimony corrected this name to that of Kenny.

¹⁴ It would also appear that the small-plant doctrine is applicable here. *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959); *A & Z Portion Meats, Inc.*, 238 NLRB 643 (1978).

other than Supervisor Sims, who attended the meeting, two were discharged, one was informed that a little bird had said she had signed a union card, and the fourth was suspended for 1-1/2 days under a suspicion that it was for union activities—all unlikely coincidences; (3) the two employees were discharged without warning; (4) the two employees had been good workers and were needed in the meat department at the time of their discharges; (5) the Respondent had threatened to close its store if the Union organized it; (6) the Respondent had referred to Carol Thomas as a “troublemaker”; and (7) Sims had told the two employees that they would be fired if they continued their dealings with the Union. Accordingly, the evidence of the General Counsel establishes a *prima facie* case within the teachings of *Wright Line* that a motivating factor for the discharges of Carol Thomas and Cunningham was to discourage union activities.¹⁵

Having concluded that the General Counsel has made a *prima facie* case under the teachings of *Wright Line*, *supra*, I turn to the Respondent’s burden of showing that it would have discharged Carol Thomas and Cunningham in the absence of protected conduct. Whether the Respondent has met this burden or, indeed, has avoided a finding of pretext¹⁶ depends substantially on the credibility of the witnesses since there are clearly contradictions between the testimony of the Respondent’s witness, Danou, and that of the General Counsel’s witnesses.

Having carefully observed the demeanor and comportment of Danou, the Respondent’s only witness, as well as that of all other witnesses, and in light of the record as a whole, pretermittting no evidence, I have concluded that Danou is unworthy of belief. I find that his reasons for discharging Cunningham and Carol Thomas were false and a fabrication. I am bolstered in this conclusion by the fact that the Respondent did not call its meat department head, “Al,” Manager Kenny Korryla, or Co-manager Martin Tonka, whose names figured in the discharges of Carol Thomas and Cunningham. The record is barren of any explanation as to why these witnesses were not called by the Respondent. Thus, the inference obtains that their testimony would have been adverse to the Respondent. *Interstate Circuit Inc., et al. v. United States*, 306 U.S. 208, 225, 226 (1939); *N.L.R.B. v. Wallick, et al.*, 198 F.2d 477, 483 (3d Cir. 1952); *N.L.R.B. v. Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943).

According to Danou, Cunningham was apparently discharged for failing to appear for work the day after having been sent home in a drunken condition, and Carol Thomas was discharged for failing to follow an order to scrape meat. If those were the reasons (which is not borne out by the credible evidence of record), Danou departed from his usual forgiving and kind consideration of his employees, for he testified that “normally” he would talk to his employees not once but on several occasions in the “area they are really lacking, they are not per-

forming.” He worked with them. He gave them “more than two or three chances.” Danou said that “he is very nice and he feels sorry for everybody.” It is also significant that, according to Danou, he discharged Cunningham without ascertaining the reason for her absence or her failure to call in. It is further significant, if Danou is credited, that he did not warn Carol Thomas when she failed to carry out his order that, if she did not do the work which he assigned her, she would be fired. Such alleged conduct on the part of Danou does not jibe with his picture of himself as being “nice,” a considerate employer, and always kind to his workers or with what an employer usually would have done.

Thus, it appears that not only has the Respondent failed to meet its burden under *Wright Line*, *supra*, but the reasons for the discharges as claimed by the Respondent did not actually exist and were therefore pretextuous. Accordingly, I find that the Respondent unlawfully discharged Mildren Cunningham and Carol Thomas on June 20, 1981, and that the Respondent thereby violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act for jurisdiction to be exercised herein.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By unlawfully threatening to close its store if the Union became its employees’ collective-bargaining representative, by unlawfully threatening its employees that they would be fired if they continued their dealings with the Union, by unlawfully interrogating its employees with respect to their union activities or sympathies, and by unlawfully creating the impression of surveillance of its employees’ union activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By unlawfully discharging Carol Thomas and Mildren Cunningham on June 20, 1981, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. Except as found hereinabove, the Respondent has not otherwise violated the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It also having been found that the Respondent unlawfully discharged Carol Thomas and Mildren Cunningham on June 20, 1981, and has since failed and refused to reinstate them, in violation of Section 8(a)(3) and (1) of the Act, it is recommended that the Respondent be ordered to remedy such unlawful conduct. In accordance with Board policy, it is recommend-

¹⁵ “Once this is established, the burden will shift to the [Respondent] to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, *supra* at 1089.

¹⁶ “[A] finding of pretext necessarily means that the reasons advanced by the [Respondent] either did not exist or were not in fact relied upon, thereby [sic] leaving in tact the inference of wrongful motive established by the General Counsel.” *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

ed that the Respondent be ordered to offer the above-named employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of their discharges to fill either of said positions, and to make them whole for any loss of earnings that they may have suffered by reason of the Respondent's acts herein detailed, by payment to them of sums of money equal to the amounts they would have earned from the date of their unlawful discharges to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁷

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER¹⁸

The Respondent, Mid-Atlantic, Inc., d/b/a Conner's Super Store, Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging union or concerted activities of its employees or their membership in Retail Store Employees Union, Local 876, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization, by unlawfully and discriminatorily discharging its employees or discriminating against them in any manner with respect to their hire or tenure of employment or any term or condition of employment in violation of Section 8(a)(3) and (1) of the Act.

(b) Unlawfully interrogating its employees with respect to their union activities or sympathies.

(c) Unlawfully threatening to close its store if the Union becomes its employees' collective-bargaining representative.

(d) Unlawfully creating the impression that it is spying on the union activities of its employees.

(e) Unlawfully threatening its employees that they would be fired if they continued their dealings with the Union.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Carol Thomas and Mildren Cunningham immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially

equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired to replace them, and make them whole for any loss of pay they may have suffered by reason of the refusal to reinstate them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any references to the discharges of Carol Thomas and Mildren Cunningham on June 20, 1981, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Detroit, Michigan, Conner's Super Store copies of the attached notice marked "Appendix."¹⁹ Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

¹⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which we participated and had a chance to give evidence, the National Labor Relations Board has found that we committed certain unfair labor practices and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT discourage union or concerted activities of our employees or their membership in Retail Store Employees Union, Local 876, United Food and Commercial Workers International

¹⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Union, AFL-CIO, or any other labor organization, by unlawfully and discriminatorily discharging our employees or discriminating against them in any other manner with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT unlawfully interrogate our employees with respect to their union activities or sympathies.

WE WILL NOT unlawfully threaten to close our plant if the Union becomes the collective-bargaining representative of our employees.

WE WILL NOT create the impression that we are spying on our employees' union activities.

WE WILL NOT unlawfully threaten our employees that they would be fired if they continued their dealings with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Carol Thomas and Mildren Cunningham immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, discharging, if necessary, any employees hired to replace them; WE WILL restore their seniority and other rights and privileges previously enjoyed; and WE WILL pay them the backpay they lost because we discriminatorily discharged them, with interest.

WE WILL expunge from our files any references to the discharges of Carol Thomas and Mildren Cunningham on June 20, 1981, and WE WILL notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

MID-ATLANTIC, INC., D/B/A CONNER'S
SUPER STORE